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No. 80-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES COLE,

Petitioner,

versus

LOUISIANA,

Respondent.

On Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the combination of pre-indictment and post-indictment delay in this case, amounting to three years and ten months between the offense and the arraignment, served to deprive petitioner of his rights to due process and a speedy trial.

II. Whether the delay of seventeen months between indictment and arraignment served to deprive petitioner of a speedy trial.

A. Is a statute of limitations a reasonable basis for judging the length of delay?

B. Is a defendant ignorant of charges against him expected to demand speedy trial thereon?

C. Must a speedy trial be demanded after delay-caused prejudice has been sustained?

D. What is the standard of proof of prejudice in a speedy trial analysis?

E. May an excessive and unexcused prosecutorial delay create a presumption of prejudice in a speedy trial analysis?

PARTIES

Petitioner Charles Cole and Respondent State of Louisiana were the only parties to this case in the court below.

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PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue herein to review the judgment of the Supreme Court of Louisiana, rendered on May 19, 1980, rehearing denied June 23, 1980.

REFERENCE TO OPINIONS BELOW

The decision of the Twenty-Second Judicial District Court for the Parish of St. Tammany, State of Louisiana, which denied petitioner's motion to quash on January 8, 1980, is unreported.

Petitioner's application for supervisory writs to the Supreme Court of Louisiana was granted on February 21, 1980. See *State v. Cole*, 380 So.2d 103 (La., 1980).

The judgment of the Supreme Court of Louisiana, affirming the denial of the motion to quash, rendered on May 19, 1980, is reported as *State v. Cole*, 384 So.2d 374 (La., 1980) and the text of the opinion is set out in the appendix hereto.

JURISDICTION

Petitioner's motion to quash the indictment was denied by the district court on January 8, 1980. On review of this decision, the Supreme Court of Louisiana affirmed the denial of the motion to quash on May 19, 1980.

A rehearing was applied for, and was denied by the Supreme Court of Louisiana on June 23, 1980.

The Supreme Court of Louisiana, whose judgment is here sought to be reviewed, is the highest court of the state in which a decision could be had. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the United States Constitution.

2. This case also involves the following provisions of Louisiana statutory law:

La. Stat. Ann. — R.S. 14:34 (1974) *"Aggravated battery"*

Aggravated battery is a battery committed with a dangerous weapon.

Whoever commits an aggravated battery shall be imprisoned, with or without hard labor, for not more than ten years.

La. Code of Crim. Proc. Ann. art. 572 (1969) *"Limitation of prosecution of noncapital offenses"*

No person shall be prosecuted, tried, or punished for an offense not punishable by death unless the prosecution is instituted within the following periods of time after the offense has been committed:

(1) Six years, for a felony necessarily punishable by imprisonment at hard labor;

(2) Four years, for a felony not necessarily punishable by imprisonment at hard labor; * * *

La. Code of Crim. Proc. Ann. art. 578 (1969)
"[Limitations upon trial] General rule"

Except as otherwise provided in this Chapter, no trial shall be commenced:

(1) In capital cases after three years from the date of institution of the prosecution;

(2) In other felony cases after two years from the date of institution of the prosecution; * * *

The offense charged shall determine the applicable limitation.

STATEMENT OF THE CASE

The petitioner is charged with an aggravated battery which allegedly occurred on September 9, 1975.

Without previously being arrested for this offense, the petitioner was indicted on this charge on February 21, 1978. Appendix, pp. 1a-2a.

After being arrested for and indicted for manslaughter in a separate case in June 1979, the petitioner was arraigned on the battery indictment on July 31, 1979. On November 8, 1979, petitioner filed a motion to quash the indictment, claiming that the delay of almost four years between the offense and the arraignment had prejudiced his defense.

The motion to quash was heard on January 8, 1980. It was stipulated that during the period between the offense and the arraignment, the petitioner was within the jurisdiction and available for trial. At this hearing, the State offered no explanation for the pre-indictment delay of over two years and five months, but claimed that the post-indictment delay of seventeen months was attributable to a change in administration in the prosecutor's office.

The petitioner was the only witness to testify at the hearing. He related an incident of November 6, 1977, in which he was "picked up" by the Sheriff's Office, but was released without being charged or booked for any offense. The petitioner received no indication that he was wanted in connection with the battery charge until just shortly before his arraignment.

The petitioner claimed that he was prejudiced by the death of his only defense eyewitness, who died in May 1979. It was noted that petitioner is presently under indictment for manslaughter in connection with the death of this witness; but it was also noted that the manslaughter charge has not yet been tried, and that petitioner is claiming self-defense in that matter.

After the hearing, the district court denied the motion to quash, for reasons orally assigned. See Appendix, pp. 13a-14a. The petitioner then applied for and was granted review of this decision by the Supreme

Court of Louisiana. The appellate court subsequently affirmed the decision of the district court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his motion to quash filed with the district court on November 8, 1980, the petitioner alleged that

> ". . . the delay of almost four years between the date of the alleged offense and the arraignment of the defendant is unreasonable and has so prejudiced the defendant that he will be unable to present an effective defense. . ." *Motion to Quash*, Appendix, pp. 3a-4a.

At the hearing on the motion to quash, held January 8, 1980, the direct examination of the petitioner commenced as follows:

> "Q - Mr. Cole, regarding your being granted a speedy trial as provided by the Constitution of the United States in this case, did you ever make contact with the Sheriff's Office about the status of your case?" *Transcript of Proceedings*, Appendix, p. 9a.

The district court denied the motion to quash, for reasons orally assigned and transcribed. See *Transcript of Proceedings*, Appendix, pp. 13a-14a.

In the review by the Supreme Court of Louisiana, the petitioner in his brief framed the issues as follows:

> "1. Whether the delay of almost two and one-half years between the date of the alleged crime and the indictment, together with the prejudice thereby caused to the defendant, served to deprive the defendant of his right to Due Process and a fair trial, guaranteed by . . . the Fourteenth Amendment to the United States Constitution.
>
> 2. Whether the delay of over sixteen months between the indictment and the arraignment, together with the prejudice thereby caused to defendant, served to deprive the defendant of his right to a speedy trial, guaranteed by . . . the Sixth and Fourteenth Amendments to the United States Constitution." *Original Brief of Relator*, Appendix, pp. 17a-18a.

In its decision, the Supreme Court of Louisiana held, with regard to the pre-indictment delay, that petitioner was responsible for the death of his witness, and that he had not shown serious prejudice; and with regard to the post-indictment speedy trial claim, held that though the delay was not excused, it was not statutorily excessive, petitioner did not demand a speedy trial and made no showing of substantial prejudice. See *Slip opinion*, Appendix, pp. 24a-27a.

Petitioner applied for rehearing, contending that the judgment conflicted with the constitution and decisions of this Court. See *Application for Rehearing*, Appendix, pp. 28a-34a. Rehearing was denied on June 23, 1980.

REASONS FOR GRANTING THE WRIT

This case presents a number of questions, essentially based upon the delay of nearly four years between the date of the crime and the petitioner's arraignment. In past discussions of pre-trial delay, this Court has divided such delay into two segments, using as a dividing line the time of "formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge."[1] Delay occurring after such time is governed by the speedy trial guarantee of the Sixth Amendment; delay prior to that point is controlled by the Due Process Clause.

The delay in this case falls into both categories: the pre-indictment delay was approximately twenty-nine months, and the post-indictment delay was seventeen months. The petitioner has separated his objections to the delay along the lines suggested by the past decisions of this Court: objections to pre-indictment delay, and objections to post-indictment delay.

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1 *United States v. Lovasco*, 431 U.S. 783, 788, 97 S.Ct. 2044, 2048 (1977); *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971).

I. The Court should grant the writ to consider whether a combination of pre-indictment and post-indictment delay in this case violates petitioner's rights to due process and a speedy trial.

If we separate the pre-indictment delay from the total delay in this case, and consider such delay in isolation under the criteria set by this Court, i.e., "the reasons for the delay as well as the prejudice to the accused;"[2] the prejudice caused to the petitioner — the death of his witness — did not occur during the period of pre-indictment delay. In the few cases in which this Court has examined the effect of allegedly prejudicial pre-indictment delay, the prejudice claimed by the defendant was sustained during the period of such delay.

In this case, the prejudice was not sustained until the next to last month of the *post*-indictment delay. While it is true that the witness did not die during the lengthy pre-indictment period, had the indictment been filed within some reasonable period of time after the crime, the witness would not then have been unavailable for trial.

It was the delay caused by the prosecution which permitted the arraignment of the petitioner to be postponed until after the defense witness had died. The

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2 *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049 (1977).

prejudice to the defense was suffered simply because the defendant was not brought to trial within the three years and eight months between the date of the offense and the date of the death of the witness.

In the present context, the date of the indictment has very little practical significance. Under Article 572, Louisiana Code of Criminal Procedure, the indictment could legally and timely have been returned *one week* before the death of the witness,[3] which would still have been within the statute of limitations. In such a case, there would have been no prejudice sustained during the lengthy pre-indictment delay; and it is virtually certain that the post-indictment delay of one week would be insufficient to make out a denial of a speedy trial. Under such circumstances, the defendant would be just as disadvantaged, but would be clearly without a remedy.

This hypothetical situation points to the need for recognition of the fact that pre-indictment delay, though not in itself prejudicial, may work a deprivation of due process when combined with post-indictment delay. Though *Marion* and *Lovasco* indicate different treatment for pre- and post-indictment delays, those cases did not raise the issue of a combination of delays, since no post-indictment delays were complained of therein. The judicial acceptance of the fact that a *combination* of pre- and post-indictment delays can

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3 This would have been three years and eight months after the offense, still within the four-year statute of limitations.

deprive an accused of his rights to due process would not be inconsistent with the decisions of *Marion* and *Lovasco*, for those cases dealt only with pre-indictment delay.

Though petitioner presented this issue to the Supreme Court of Louisiana in his brief on the merits,[4] and in his petition for rehearing,[5] that court did not reach that particular issue.[6] The only decision known to petitioner in which a state court of last resort has reached the issue is *People v. Staley*, 41 N.Y.2d 789, 396 N.Y.S.2d 339 (1977). In that case, the defendant was initially arrested soon after the crime, and was charged by bill of information. The prosecutor dismissed the bill, reserving the right to seek indictment. Thirty-one months later, the defendant was indicted, with no reason being advanced for the delay. Soon after indictment, the defendant was tried and convicted. In reversing the conviction on constitutional grounds, the New York Court of Appeals observed:

> "[W]hen unexplained or inexcusable preindictment delay and postindictment delay,

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4 "Whether the pre-indictment delay was 25 months or 45 months, the important fact is that the *total* delay caused the prejudice." *Original Brief of Relator*, Appendix, p. 19a.

5 ". . . Cole contends that the *combination* of pre-indictment and post-indictment delays placed the trial date beyond the life of his witness: had either delay been shortened by one year, the witness would have been available for trial." *Application for Rehearing and Supporting Brief*, Appendix, p. 34a.

6 The Supreme Court of Louisiana has never determined the effect of a combination of delays in any case reported to date.

taken together, work a deprivation, it is a deprivation of due process of law. In such a case, it is unnecessary to determine whether the postindictment delay alone is sufficiently unreasonable to mandate dismissal of an indictment." 41 N.Y.2d, at 791, 396 N.Y.S.2d, at 341.

Obviously, petitioner's situation of combined delays causing prejudice is not unique, if a court of last resort in another state has passed upon the issue. If indeed the combination of delays may be considered in determining a due process claim based upon pre-trial delay, this Court should consider the issue and offer some guidance or indication to the lower courts on how such claims are to be treated. This question has not been reached by this Court, since it has not previously been presented.

A writ of certiorari should therefore issue to consider whether the combination of pre-indictment and post-indictment delay served to deprive petitioner of his rights to due process or to a speedy trial.

II. The Court should grant the writ to consider whether the post-indictment delay of seventeen months, together with the other relevant circumstances, deprived petitioner of a speedy trial.

Following the indictment, there was a delay of seventeen months before petitioner's arraignment. Approx-

imately six weeks before the scheduling of the arraignment, petitioner's sole defense eyewitness died. No attempts to schedule an arraignment were made prior to the death of this witness. The petitioner did not learn of the pending indictment until after the death of the witness.

In dealing with petitioner's claim that his Sixth Amendment right to a speedy trial had been violated, the Supreme Court of Louisiana disposed of the claim in four paragraphs. See *Slip opinion*, Appendix, pp. 26a-27a.

The court was correct in stating that the four factor test established by this Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), is applicable to speedy trial claims. Beyond this observation, the opinion falls into error and presents a number of questions for review.

A. The Court should grant the writ to consider whether a statute of limitations is an appropriate measure of delay for speedy trial purposes.

"[I]t is apparent that . . . the delay between indictment and arraignment was one year and five months, not *statutorily excessive.*" *Slip op.*, Appendix, p. 27a). (emphasis added).

In the prior decisions of this Court, there has been no demonstration of the relevance of a statute of limita-

tions to the adjudication of a speedy trial claim. Louisiana has no speedy trial act, as do some other jurisdictions, which would define an excessive delay presumptively prejudicial for speedy trial purposes.

Article 578, Louisiana Code of Criminal Procedure, sets the time limitations for the commencement of trial following the institution of prosecution, and any "statutorily excessive" delay under that statute would be an absolute bar to prosecution, in and of itself. A delay in excess of that permitted by the statute would render unnecessary the consideration of any other factors: prosecution would thus be barred on statutory grounds, and any speedy trial inquiry beyond that would be a purely academic exercise.

Predicating the right to a speedy trial upon a statute of limitations would render the right totally meaningless, since the right would then depend upon the statute rather than upon constitution, and the sole relevant factor would be the amount of time involved.

The reliance upon a statute of limitations by the Supreme Court of Louisiana is not supported by the language of *Barker*:

> "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." 407 U.S., at 523, 92 S.Ct., at 2188.

And a reliance upon a statute of limitations in judging speedy trial claims further endangers the constitutional right, because, as this Court noted in *Barker*:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 U.S., at 530, 92 S.Ct., at 2192.

By its reasoning, the Supreme Court of Louisiana has here defeated the purpose of the *Barker* decision. The Louisiana court, if it complied in all other respects with the *Barker* decision, would require a statutorily excessive delay to "trigger" the inquiry into the other factors; yet there would then be no need for consideration of any other factors, since prosecution would then be barred on statutory grounds.

The reduction of the constitutional right of speedy trial to regulation by a statute of limitations conflicts with prior decisions of this Court, and additionally makes a federal right subject to regulation by state law. A writ of certiorari should issue to review this departure from the past decisions of this Court.

B. *The Court should grant the writ to consider whether a defendant ignorant of charges against him must demand a speedy trial thereon; and to consider whether a defendant must demand a speedy trial after sustaining prejudice caused by prosecutorial delay.*

The extent of the Louisiana court's treatment of the *Barker* factor of demand for speedy trial consists entirely of ten words: "the defendant has not asserted a demand for speedy trial." *Slip op.*, Appendix, p. 27a.

It is extremely difficult to gather the court's reasoning from these few words, but apparently the court held the lack of demand against the petitioner.

The petitioner did not learn of the existence of formal charges against him until sixteen months after indictment. The question now presented and not yet decided by this Court is whether an accused who does not know that he is an accused can be expected to assert the rights of an accused by demanding a speedy trial.

An affirmative answer to that question would require a defendant to assert a right of which he is ignorant, under penalty of losing the right for the lack of asserting it. Such a holding would be inconsistent with this Court's pronouncements on the subject of waiver of constitutional rights.[7]

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7 "The Court has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts should 'indulge every reasonable presumption against waiver,' Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937), and they should 'not presume acquiescence in the loss of fundamental rights,' Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937)." *Barker v. Wingo*, 407 U.S. 514, 525-26, 92 S.Ct. 2182, 2189-90 (1972).

In keeping with the decisions of this Court, it can only be held that a defendant who does not know that he is an accused cannot be expected to demand a speedy trial, and that the lack of demand in such instances is a neutral factor in a speedy trial analysis. Courts other than the Supreme Court of Louisiana have recognized this logical extension of the *Barker* rationale against waiver.[8]

In this case, the petitioner learned of the existence of formal charges against him after the death of his witness. Should he then have demanded a speedy trial? The prejudice had already been sustained, and certainly could not be cured by a speedy trial or any demand therefor. Expecting a defendant in such circumstances to demand a speedy trial would, in practice, require the "automatic, *pro forma*" demand for trial, a result disapproved of by *Barker*.[9]

In either of the circumstances present in this case — a defendant ignorant of any charges against him, or a defendant who learns of charges after sustaining irremediable prejudice through prosecutorial delay — a defendant cannot be expected to demand a speedy trial, and the failure to make a demand in such cases should not be weighed against the defendant.

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8 *E.g., Taylor v. United States*, 99 U.S.App.D.C. 183, 238 F.2d 259 (1956); *United States v. Dyson*, 469 F.2d 735 (CA5, 1972); *Edmaiston v. Neil*, 452 F.2d 494 (CA6, 1971); *Fouts v. United States*, 253 F.2d 215 (CA6, 1958); *United States v. Gladding*, 265 F.Supp. 850 (S.D.N.Y., 1966); *State v. Roberts*, 358 N.E.2d 181 (Indiana App., 1976).

9 407 U.S., at 528, 92 S.Ct., at 2191.

Since this Court has not yet considered these points, being logical extensions of the *Barker* decision, a writ of certiorari should issue.

C. *The Court should grant the writ to determine the standard of prejudice for speedy trial claims; and to consider whether a presumption of prejudice may be created through excessive and unjustified prosecutorial delay.*

The handling of the issue of prejudice caused by delayed trials has not been uniform among the states and federal circuits, possibly due in part to the "amorphous quality" of the right to a speedy trial. But the imprecision of the right does not explain or justify inconsistent methods of assessing prejudice to the accused.

This Court has held that in a speedy trial analysis, proof of prejudice is "[n]either a necessary [n]or sufficient condition to the finding of a deprivation of the right to a speedy trial."[10]

In dealing with the speedy trial argument presented by petitioner to the Louisiana Supreme Court, that court concluded, as regards prejudice: "there is no showing of substantial prejudice to the accused." *Slip op.*, Appendix, p. 27a.

On its face, this conclusion appears to be contrary to the decision of this Court in *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973):

10 *Barker v. Wingo*, 407 U.S., at 533, 92 S.Ct., at 2193.

> "In affirming the denial of the petition, the Arizona Supreme Court ruled that . . . a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim. * * * The state court was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's speedy trial claim. Barker v. Wingo expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." 414 U.S., at 25-26, 94 S.Ct., at 189.

In light of the other three *Barker* factors in this case — the sixteen month delay caused by unexcused prosecutorial delay during which the petitioner was ignorant of any charges against him — all of which weigh in favor of petitioner, the court below clearly required an affirmative showing of prejudice; otherwise, on balance, the result would have been opposite.

Apparently the Louisiana Supreme Court requires a "showing of substantial prejudice." But the Fifth Circuit (whose territorial jurisdiction includes Louisiana) has used a different approach. In the case of *United States v. Dyson*, 469 F.2d 735 (CA5, 1972), the defendant was charged with draft evasion. Twenty-two months elapsed between indictment and trial. In its analysis of the standard of and burden of proof, the Fifth Circuit held:

> "The only specific incident of prejudice which the defendant alleges is that his church would not allow him to marry while the indictment was pending. In addition, he alleges the general claim of anxiety and apprehension of trial. But it is not his burden to prove prejudice. In Murray v. Wainwright [450 F.2d 465] we held: 'Where the delay is not only excessive but the result of unexcused inaction or misconduct by the Government, it is prima facie prejudicial. * * * The burden then shifts to the Government which must demonstrate that defendant has not been prejudiced by the delay.' " 469 F.2d, at 740.

The Louisiana court's requirement of a showing of substantial prejudice is also contrary to the decision in *Chism v. Koehler*, 392 F.Supp. 659 (W.D. Mich., 1975):

> "Upon a showing of excessive and unjustified delay, and some showing by the defendant that there is a *reasonable possibility* that the defense was impaired, the burden then shifts to the state to show that the defendant was not in fact prejudiced by the delay." 392 F.Supp., at 667 (original emphasis).

Among the Fifth Circuit, the Western District of Michigan and the Louisiana Supreme Court, we have three different treatments of the question of proof of prejudice: the Louisiana court requires a showing of

substantial prejudice, without qualification; the District Court of Michigan allows excessive and unjustified delay *plus* a showing of the possibility of prejudice to create a rebuttable presumption of prejudice; while the Fifth Circuit would allow excessive and unexcused delay *alone* to create the presumption.

Should there be a presumption of prejudice in such cases? If so, what facts are needed to create the presumption? This Court has not addressed these issues,[11] and the lack of an authoritative decision by the Court on these issues is the reason for the disparate treatments of the question of prejudice.

In this case, the petitioner testified at the hearing that the deceased eyewitness was standing within a few feet of him when the alleged battery occurred. This should indicate that the defense would not be an alibi: some altercation obviously occurred, and the events thereof would necessarily be explained by eyewitness testimony. How would the petitioner be able to prove what his witness would have said at trial? Because he did not learn of the pending charges until after the death of the witness, he had no reason to take a written statement from the witness. Moreover, the State had more than three years to investigate the incident, knowing full well that a trial was in the offing. If the

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11 In *Barker*, there is a reference to a presumption of prejudice from the length of delay, but no elaboration upon the possibility of such a presumption: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors . . ." 407 U.S., at 530, 92 S.Ct., at 2192.

witness could not have helped petitioner by his testimony, surely the State would have discovered this fact. But at the hearing, the State offered neither evidence nor argument to contradict the petitioner's claim that the witness was necessary to the defense.

Rather, the State contended that petitioner was responsible for the death of his witness, and the Louisiana Supreme Court accepted this argument. If we apply for the sake of argument the traditional presumption of innocence prior to conviction, this reasoning places petitioner in a dilemma: either he can defend himself against an attack by his witness at the cost of losing the witness and being convicted on the battery charge in the absence of the witness; or he can suffer serious injury and possibly death. Under the latter option, the witness may have been available for trial rendered unnecessary due to the death of the defendant.

In practice, the reasoning of the Louisiana Supreme Court forces petitioner to forfeit his constitutional rights to a speedy and fair trial under penalty of loss of life or limb. But the constitution does not exact such a price for its protections. The conclusion of the court below totally overlooks the unexcused three and one-half year delay during which the State did nothing. Had petitioner been tried within a few months of the crime (as is the norm), the witness would have been available.

Attributing to petitioner the prejudice caused by the loss of his witness is contrary to equity, reason and the

constitution. A writ of certiorari should therefore issue to correct the judgment below which is contrary to this Court's decision in *Moore v. Arizona*, relative to the showing of prejudice required; and to decide whether and in what circumstances a presumption of prejudice may be created, in order to settle the conflict among jurisdictions as to the standard of and burden of proof.

D. The Court should grant the writ to consider whether the court below properly applied the "balancing test" of Barker v. Wingo.

The four factors of *Barker* are not a check-list, all of which have to be met to make out the demand for a speedy trial. "[T]hese factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."[12]

The petitioner cannot locate, in the opinion below, this difficult and sensitive balancing process: the court below used the statute of limitations to measure the delay, and reached the irrelevant conclusion that the delay is not "statutorily excessive"; the point of lack of demand for speedy trial is dismissed with ten words, with no examination of the underlying reasons therefor; and there is no mention in the abbreviated examination of prejudice of the fact that the State waited sixteen months after the indictment — and after the death of the defense witness — just to fix a date for the arraignment. If there was indeed any balancing in this

12 *Barker v. Wingo*, 407 U.S., at 533, 92 S.Ct., at 2193.

cursory disposition of petitioner's claim, it is not revealed in the opinion; and if indeed the court below regarded the *Barker* factors as anything other than a check-list, the opinion does not so indicate.

What is basically overlooked in the decision below is that the primary cause of the problem is the delay, wholly attributable to the State, during which petitioner was ignorant of the charges against him, and during which time the defense eyewitness died. The prosecution has no constitutional right to procrastination. On the contrary, the petitioner has a constitutional right to speedy trial, an interest which the *Barker* process was intended to protect, and "because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."[13]

The failure of the court below to examine petitioner's claim through the balancing process mandated by *Barker* is yet another reason for the issuance of the writ.

---

13 *Ibid.*

CONCLUSION

For the reasons set forth above, petitioner prays that a writ of certiorari issue herein to review the judgment of the Supreme Court of Louisiana.

GARLAND R. ROLLING
319 Metairie Road
Post Office Box 9250
Metairie, Louisiana 70055
(504) 835-2543

Attorney for Petitioner

APPENDIX

No. 62,919

STATE OF LOUISIANA

versus

CHARLES COLE

Indictment for
Aggravated Battery

A TRUE BILL

/s MAX W. WOOD,
Foreman of the Grand Jury

STATE OF LOUISIANA—
PARISH OF ST. TAMMANY

Twenty-second Judicial District Court,
February 9 Term, 1978

The Grand Jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of St. Tammany, in the name and by the authority of the said State, upon their oath find and presents:

That one, CHARLES COLE, late of the Parish of St. Tammany, on or about the 9th day of September, in the year of our Lord, one thousand nine hundred seventy-five ~~eight,~~ in the Parish of St. Tammany, aforesaid, and within the jurisdiction of the Twenty-second Judicial District Court of Louisiana, for the Parish of St. Tammany, Unlawfully violated R.S. 14:34, by committing a battery with a dangerous weapon, to-wit; a baseball bat, upon the person of Billy Ray Crain.

Contrary to the form of the Statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same.

/s/ KURT V. SINS
Asst. District Attorney of the
22nd Judicial District of
Louisiana

FILED: February 21, 1978

22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA

versus No. 62,919

CHARLES COLE

Filed: Nov. 8, 1979 /s/ Carmen D. Fabre, Dy. Clk.

MOTION TO QUASH

Defendant Charles Cole, through undersigned counsel moves the Court to quash the indictment herein and to dismiss this prosecution for the reason that the delay of almost four years between the date of the alleged offense and the arraignment of the defendant is unreasonable and has so prejudiced the defendant that he will be unable to present an effective defense.

WHEREFORE, defendant prays that the District Attorney be ordered to show cause why the indictment herein should not be quashed and this prosecution dismissed.

/s/ GARLAND R. ROLLING
Attorney for Defendant

ORDER

LET the District Attorney show cause on the ____ day of _____, 1979, why the indictment herein should not be quashed and this prosecution dismissed.

Covington, Louisiana, this 8th day of November, 1979.

/s/THOMAS J. TANNER
Judge

22ND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA

STATE OF LOUISIANA

versus No. 62,919

CHARLES COLE

TRANSCRIPT OF PROCEEDINGS taken before the Honorable John W. Greene, Judge Presiding, Division "D", Twenty-Second Judicial District Court,

Parish of St. Tammany, State of Louisiana, on Tuesday, January 8, 1980, Covington, Louisiana.

APPEARANCES:

WILLIAM R. ALFORD, JR., ESQ.
(Assistant District Attorney)

GARLAND R. ROLLING, ESQ.
(Attorney for Defendant)

* * *

THE COURT:
What do we have today?

MR. ROLLING:
A motion to quash. We may stipulate to most of it. It may take a couple minutes of testimony. That's about it. But whatever Your Honor pleases —

THE COURT:
Well, you start. We can go ahead with it if you're ready to proceed.

MR. ROLLING:
Judge, if it please the Court, I think we can stipulate and agree that the instance with which Mr. Charles Cole is charged with took place on September the 8th, 1975, at which time he allegedly committed aggravated battery. We can further stipulate that he was not indicted for this offense until February the 21st, 1978. The True Bill was filed.

THE COURT:

Wait. Let me get those dates. September 8th —

MR. ROLLING:

1975.

THE COURT:

— 1975, is the date of the alleged crime?

MR. ROLLING:

Alleged crime.

THE COURT:

Okay.

MR. ROLLING:

He was indicted on the 21st of February, 1978, in accordance with the record. The notice of arraignment went out for July the 10th, 1979; and we can further stipulate that he was within the jurisdiction of the court and readily available for trial during this period of time.

THE COURT:

Are you ready to stipulate to all of that?

MR. ALFORD:

Your Honor, the case has not prescribed in spite of all of that. A plea of prescription, I believe, had previously been filed and had been overruled. The reason being that the indictment under the Code of Criminal Pro-

cedure was brought within the period of time required for the bringing of the indictment.

MR. ROLLING:

Four years.

MR. ALFORD:

That's right, it's within four years of the date of the offense. So the indictment was okayed when it was filed. There has been — There was a delay between the time of the filing of the indictment and the arraignment; but, of course, as the Court knows, there was a change of administration in the office and old files were reviewed and brought up. So that was probably the reason for that delay. Since that time, there have not been any undue delays in attempting to get the case to trial. Mr. Rolling has attempted to — has applied for writs on one occasion that I know of. I do notice in the record that there are — Mr. Rolling has filed some motions for continuance at one point. I believe I saw some motions for a continuance.

MR. ROLLING:

No problem since 7/10/79. It's only what happened prior to 7/10/79 we're concerned with here today.

MR. ALFORD:

Then, again, since the case was not prescribed under the law, Mr. Rolling is, I suppose, arguing that he was not speedily — The indictment was not speedily brought and that he was prejudiced by that, and I would

only point out to the Court that Louisiana has no speedy trial act, but no request for a speedy trial was ever filed on Mr. Coleman's [sic] behalf during that period.

MR. ROLLING:
Couple minute's testimony —

THE COURT:
All right.

MR. ROLLING:
Do you want to take the stand, Mr. Cole.

THE COURT:
All right, come around and be sworn.

MR. ROLLING:
The stipulation we mentioned is agreeable, is that correct?

MR. ALFORD:
Yes.

MR. ROLLING:
Let the record so reflect it.

CHARLES COLE, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION BY MR. ROLLING:

Q Mr. Cole, regarding your being granted a speedy trial as provided by the Constitution of the United States in this case, did you ever make any contact with the Sheriff's Office about the status of this case?

A Since it allegedly happened, you mean?

Q Yes, that's correct.

A I've never made contact voluntarily. I've had contact witn them, yes, sir.

Q And what, if anything, happened when you made contact with the Sheriff's Office?

A Well, okay, November the 6th of 1977, I was at my brother-in-law's house, Johnny Fitzmorris, which we had a disagreement, and he subsequently called the law, and two sheriff's deputies from here came to his residence and picked me up and brought me in because Johnny says, "Hey, there's warrant and everything for you," so they brought me down here, took me back here, called the sheriff, and the sheriff says —

MR. ALFORD:

Your Honor, I'm going to object to hearsay.

THE WITNESS:

— Let him go.

THE COURT:

I will sustain the objection. Don't tell us anything that somebody else told you.

THE WITNESS:

What did I say that somebody else told me?

THE COURT:

Just remember that, don't say anything that somebody else told you. I sustained the objection.

EXAMINATION BY MR. ROLLING:

Q What happened after you were brought here? Were you released?

A I was released. In fact, I was brought back to my car.

Q What was your understanding of the situation when you were released?

A They told me there wasn't anything to it.

Q Now, can you tell me who the key witness is in the defense of this particular case?

A Well, it's Johnny Fitzmorris would be the key witness.

Q Was he an eyewitness to what happened?

A He was an eyewitness. He was standing right there.

Q Within how many feet of you when the crime happened?

A Just a few feet, four or five feet.

Q And where is he now?

A He's dead.

Q Can you properly prepare your case without his testimony?

A I don't see how I could.

MR. ROLLING:
That's all.

CROSS-EXAMINATION BY MR. ALFORD:
Q Well, Mr. Cole, you killed Mr. Fitzmorris, didn't you?

MR. ROLLING:
No. Note an objection to that unless we're going to go into all the circumstances of how Mr. Fitzmorris died.

EXAMINATION BY MR. ALFORD:
Q Well, is that correct? You shot Mr. Fitzmorris?
A After he shot me twice, yes, sir.

THE COURT:
Well, I think that's far enough.

MR. ALFORD:
That's all I wanted. If the man was a main witness and not here, then it's probably his fault and not the State's.

MR. ROLLING:
If it please the Court, I feel, to preserve the record, I'm going to have to take some testimony about the fact that the case is being defended on the grounds of self-defense.

THE COURT:

I think the record will — You may state that for the record if you want. You've already stated it.

MR. ROLLING:

I'd like to state for the record and go further —

THE COURT:

I'm not going to let you go any further. I'm going to let you state for the record that you already stated —

MR. ROLLING:

I'm going to say —

THE COURT:

Do not interrupt me, sir. Do you hear me? Do not interrupt me.

MR. ROLLING:

Okay. No problem.

THE COURT:

What were you going to say?

MR. ROLLING:

If it please the Court, let me apologize. I thought you were through. If it please the Court, for the purpose of the record I'd like to state that Mr. Cole is presently charged with killing Johnny Fitzmorris, his key witness, which happened several years after this incident; and the defense of the case is self-defense. As was in

the record, Mr. Cole was shot twice before he shot the other man.

MR. ALFORD:

Your Honor, I certainly didn't mean to get into that case. That is another charge. But I did think the Court might —

THE COURT:

I understand. I think we've gone far enough in it. Fine. Are you through? Did you say you tendered the witness?

MR. ROLLING:

That's it.

THE COURT:

Cross?

MR. ALFORD:

I have nothing further.

THE COURT:

You may step down. Well, that's very interesting. Well, this Court is going to deny the motion to quash. I feel — This Court feels like since the defendant did not contact the State and request at any time that this proceeding be expedited and that it be brought to trial or dropped or culminated in some way, that he bears as much blame as the State. I'm going to deny the motion to quash. It's up to the D.A.'s Office as to what it wants

to do with this charge. I'm going to deny the motion to quash.

* * *

(End of proceedings)

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

STATE OF LOUISIANA

versus No. 66,793

CHARLES COLE

In Re: Charles Cole, applying for Supervisory Writs, Parish of St. Tammany, number 62,919

February 21, 1980

Writ granted. (See order attached).

PFC
JAD
WFM
JLD
FAB
JCW

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
February 21, 1980

/s/ FRANS J. LABRANCHE, JR.
Clerk of Court

THE SUPREME COURT OF THE
STATE OF LOUISIANA

STATE OF LOUISIANA

versus No. 66,793

CHARLES COLE

In re Charles Cole applying for Writ of Certiorari in No. 62,919 on the docket of the 22nd Judicial District Court for the Parish of St. Tammany

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The petition of the relator in the above entitled and numbered case having been duly considered,

It is ordered that a Writ issue herein, and that the Honorable John W. Greene, Judge, and the 22nd Judicial District Court for the Parish of St. Tammany transmit to the Supreme Court of Louisiana IMMEDIATELY, the record in duplicate, or a certified copy of the record in duplicate, of the proceedings complained of by the relator herein.

This cause will be heard on Friday, April 11, 1980, to determine whether the relief prayed for in the petition of the relator should be granted.

Witness the Honorable Justices of the Supreme Court of the State of Louisiana on this 21st day of February, in the year of Our Lord, One Thousand, Nine Hundred and Eighty.

/s/ FRANS J. LABRANCHE, JR.
Clerk of Court

IN THE SUPREME COURT OF LOUISIANA

No. 66,793

STATE OF LOUISIANA

versus

CHARLES COLE

ORIGINAL BRIEF OF RELATOR

Filed: March 12, 1980

* * *

ISSUES PRESENTED FOR DECISION

1. Whether the delay of almost two and one-half years between the date of the alleged crime and the indictment, together with the prejudice thereby caused to the defendant, served to deprive the defendant of his right to Due Process and a fair trial, guaranteed by Article 1, Section 2 of the Louisiana Constitution and by the Fourteenth Amendment.

2. Whether the delay of over sixteen months between the indictment and the arraignment, together

with the prejudice thereby caused to the defendant, served to deprive the defendant of his right to a speedy trial, guaranteed by Article 1, Section 16 of the Louisiana Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

It was not until May 1979 that defendant Charles Cole became aware of the State's intent to prosecute him for an alleged aggravated battery which is said to have occurred in September 1975, three years and eight months earlier. An examination of the record discloses that — other than the actual indictment filed on February 21, 1978, the first step in the prosecution was the setting of the arraignment of the indictment, taken on July 3, 1979.

* * *

While the defendant can find no *factual* basis for treating differently the pre-indictment and the post-indictment delays in this case, particularly in light of the nature of the prejudice suffered by the defendant during the delay, our jurisprudence has established separate analyses for assessing the effect of delay and for applying appropriate remedies.

* * *

I. *Pre-Indictment Delay*

* * *

The defendant testified at the hearing that his defense eyewitness had died prior to arraignment. While it is true that the witness did not die during the pre-indictment delay, had the indictment been filed within some reasonable period of time after the crime, the witness would not have then been unavailable for trial.
* * *

The prejudice to the defense was suffered simply because the defendant was not brought to trial within the three years and eight months between the date of the offense and the date of the death of the defense witness.

The actual date of the filing of the indictment has little practical effect in assessing the degree of prejudice suffered by the accused. The total pre-arraignment delay was 46 months. Whether the pre-indictment delay was 25 months or 45 months, the important fact is that the *total* delay caused the prejudice.

The relevant date in determining prejudice is the date of the death of the witness, not the date of the indictment. The total pre-arraignment delay caused the prejudice, most of which was pre-indictment delay.

Neither this Court nor the United States Supreme Court has considered the issue of prejudice caused by a *combination* of pre- and post-indictment delay.

* * *

II. *Post-Indictment Delay*

This issue involves the constitutional right to a speedy trial, guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, Section 16 of the Louisiana Constitution.

* * *

As discussed previously, a battery charge by its nature would not appear to require lengthy investigation and preparation; and thus would seemingly fit into the category of "ordinary street crimes." In *State v. Nowell*, 363 So.2d 523 (La., 1978), the Court found a one year delay to be presumptively prejudicial in another prosecution for aggravated battery. In *United States v. Butler*, 426 F.2d 1275 (1st Cir., 1970), a delay of nine months was found to be overly long in a case which depended upon eyewitness testimony. The instant case is a prosecution for aggravated battery which depends upon eyewitness testimony. The 17-month delay is presumptively prejudicial.

* * *

C. Demand for Speedy Trial

* * *

One factor which may have been overlooked by the district court's decision is that prior to the scheduling of his arraignment — some sixteen months after the indictment — the defendant did not know that he was indicted.

* * *

Does either law or logic require that a defendant, who has no knowledge that he is an accused, make a demand for a speedy trial so as to preserve his rights thereto? This Court has not previously addressed this particular question; but the decisions of other jurisdictions on the issue, decided upon constitutional grounds, may prove instructive.

* * *

There was no demand for a speedy trial in this case, simply because the defendant did not know he was an accused so as to be entitled to a speedy trial. By the time defendant realized he was indicted for battery, his witness had died, and any demand thereafter for a speedy trial would have been pointless: the damage had already been done.

D. Prejudice to the Accused

* * *

The State brought out the fact that the defendant shot Fitzmorris, and it was noted that the defendant asserts self-defense in connection with that incident. *Transcript*, p. 12. The State did not dispute the defendant's testimony, either by way of evidence, testimony or argument. The State commented that

> "If the man was a main witness and not here, then it's probably his fault and not the State's." *Transcript*, p. 11.

The manslaughter charge and the issue of self-defense have not yet been tried, so the question of "fault" for the death of the witness continues open. But the fact remains that the witness lived and was available to testify for nearly four years after the alleged crime. The defendant submits that it is not his fault that the prosecution was delayed for nearly four years. If a case is not brought to trial within a reasonable period of time, when the defendant is available for trial and has taken no steps to impede prosecution, by whose "fault" does such delay occur?

* * *

It should be clear that an affirmative showing of prejudice is not essential. The Arizona Supreme Court

has held such a showing was necessary, but the Supreme Court reversed: * * * *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973).

In the case of *United States v. Dyson*, 469 F.2d 735 (CA5, 1972), the defendant was charged with draft evasion. Twenty-two months elapsed between indictment and trial. In its analysis of the standard of and burden of proof, the Court found:

* * *

The United States District Court for the Western District of Michigan construed the question of proof of prejudice thus:

* * *

The defendant's testimony of the loss of his only defense witness remains uncontradicted. * * * It would seem reasonable that upon the showing made by the defendant, the State would be required to make a counter-showing. None has been made.

The defendant has presented the reasonable possibility that his defense has been prejudiced by the delay.

* * *

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

versus No. 66,793

CHARLES COLE

ON WRIT OF CERTIORARI TO THE
TWENTY-SECOND JUDICIAL DISTRICT COURT,
PARISH OF ST. TAMMANY
HONORABLE JOHN W. GREENE, JUDGE

WATSON, Justice.*

On September 9, 1975, defendant Charles Cole allegedly battered Billy Ray Crain with a baseball bat. He was indicted for aggravated battery in violation of LSA-R.S. 14:34 on February 21, 1978, and arraigned on July 31, 1979. On November 8, 1979, he filed a Motion to Quash the indictment because of the delay of almost four years between the offense and arraignment.[1] The trial judge denied the motion and a writ of certiorari

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* Honorable Richard H. Gauthier participated in this decision as Associate Justice Ad Hoc.

1 Following arraignment, trial was set for August 24, 1979, but was continued three times on defense motion. Defendant does not complain of post-arraignment delays; his only objection is to the delay between the offense and the arraignment.

was granted to review Cole's contention that he was denied a fair and speedy trial by excessive pre-indictment and post-indictment delays.

Statutes of limitation are the primary protection against stale criminal charges. State v. Crain, ___ So.2d ___ (Docket No. 65,960, La., 1980). Aggravated battery is a felony not necessarily punishable by imprisonment at hard labor (LSA-R.S. 14:34), so the permissible delay for the institution of prosecution is four years. LSA-C.Cr.P. art. 572(2). This indictment was filed well within the statutory limitation.

As to the post-indictment delay, there is also no violation of the statute of limitations. Trial was scheduled for a date within two years of the indictment. LSA-C.Cr.P. art. 578(2). Therefore, the only issue is whether the pre-indictment and post-indictment delays violated defendant's constitutional right to a speedy trial.

Alleged violations of due process of law through pre-indictment delays are evaluated by weighing the government's justification for the delay against the degree of prejudice to the accused. State v. Malvo, 357 So.2d 1084 (La., 1978); State v. Crain, supra.

The State has offered no explanation for the delay of two years and five months between the alleged offense and the indictment.[2] There is nothing in the record to

---

2 The State claimed that a change in administration in the District Attorney's office was the reason for the delay between indictment and arraignment, but did not account for the pre-indictment delay. (Tr. 6)

indicate that the case warranted extensive investigation or that the State had difficulty in locating the accused. No justification for the delay is claimed.

Defendant contends that he was prejudiced by the pre-indictment delay because the sole eyewitness, Johnny Fitzmorris, died prior to defendant's arraignment. The testimony at the hearing on the motion to quash revealed that Cole killed Fitzmorris and is charged with manslaughter. Defense counsel indicated that his defense is justifiable homicide, claiming that Cole was shot twice before he shot Fitzmorris. (Tr. 12)

Any prejudice resulting from Fitzmorris' death is nonetheless attributable to defendant and not the State. Regardless of Cole's culpability, Fitzmorris died by his hand. Also there is no evidence as to what this witness would have said or that his testimony would have been favorable to defendant. Serious prejudice is not shown. Compare State v. Malvo, supra.

The particular circumstances of each case determine the weight to be ascribed to the length and reasons for a post-indictment delay. State v. Reaves, 376 So.2d 136 (La., 1979).

The right to a speedy trial stems from the Sixth Amendment to the United States Constitution and Article 1, Section 16 of the Louisiana Constitution of 1974. Speedy trial claims, are evaluated under the four

factor test enunciated in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The considerations are the length of the delay, the reasons for the delay, defendant's assertion of his right to a speedy trial and the prejudice which defendant has suffered.

Applying the Barker v. Wingo factors here, it is apparent that: (1) the delay between indictment and arraignment was one year and five months, not statutorily excessive; (2) no significant reason has been offered by the State for the delay; (3) the defendant has not asserted a demand for speedy trial; and (4) there is no showing of substantial prejudice to the accused.

Considering all the circumstances, there is not a violation of defendant's right to a speedy trial.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Dated: May 19, 1980

IN THE SUPREME COURT OF LOUISIANA

No. 66,793

STATE OF LOUISIANA

versus

CHARLES COLE

APPLICATION FOR REHEARING
AND SUPPORTING BRIEF

Filed: May 30, 1980

* * *

MAY IT PLEASE THE COURT:

In his original brief, the defendant presented two alleged errors: the denial of his right to due process and a fair trial based upon pre-indictment delay, and the denial of his right to a speedy trial based upon post-indictment delay.

The actual prejudice claimed by the defendant occurred during the post-indictment delay, governed by

the speedy trial guarantee; and thus, the major issue raised by the defendant was that of the denial of a speedy trial. The pre-indictment delay was raised only under the argument that both delays *combined* served to cause the prejudice.

* * *

I. "STATUTORILY EXCESSIVE" DELAY

* * *

The defendant is at a loss to understand the significance of any statutory limits in the adjudication of a speedy trial claim. * * *

Article 578, Code of Criminal Procedure, establishes the time limitations for the commencement of trial following the institution of prosecution, and any "statutorily excessive" delay under that statute would be an *absolute bar* to prosecution, in and of itself. If indeed it is Article 578 which the Court has in mind in speaking of "statutorily excessive" delay, surely the Court must realize that any delay as defined therein would render unnecessary the consideration of any other factors: prosecution would thus be barred on statutory grounds rather than on constitutional grounds, and any speedy trial inquiry beyond that would be a purely academic exercise.

* * *

II. NO DEMAND FOR SPEEDY TRIAL

The extent of this Court's treatment of the issue of demand for a speedy trial consists entirely of *ten words:*

> ". . . the defendant has not asserted a demand for speedy trial;" *Slip op.*, p. 3.

The statement is undoubtedly true, but it ignores the underlying reasons for the lack of demand, and produces two basic errors.

First of all, the defendant did not learn of the existence of formal charges against him until sixteen months *after* he was indicted. Does this Court honestly expect an accused who does not know that he is indeed an accused to assert the rights of an accused? Upon what legal or logical grounds can we expect a defendant to assert a right of which he is ignorant? * * *

The Court's opinion gives no indication that the defendant's ignorance of the existence of formal charges against him was even considered.

And after the defendant discovered the existence of the charges, should he then have demanded a speedy trial? The answer is that the defendant did not learn of the charges until after the death of his only defense eyewitness. By that time, the testimony of this witness had been irretrievably lost and the prejudice sustained. A demand for a speedy trial would certainly not

have cured the prejudice, and in practice would probably have only hastened a possible conviction due to the absence of the witness. And so this Court expects the defendant to actively seek prosecution after his defense has been severely and irreparably impaired, in order that he may later complain of the denial of the right to speedy trial.

If anything, the lack of demand for a speedy trial in this case is irrelevant due to the particular circumstances of this case. But this court's opinion does not treat the absence of demand as irrelevant, but rather holds the lack of demand against the defendant. The result is contrary to both reason and to the decisions of the federal courts.

III. PREJUDICE

> "(4) there is no showing of substantial prejudice to the accused." *Slip op.*, p. 3.

This statement is contrary to the decision in *Moore v. Arizona*, 414 U.S. 25, 94 S.Ct. 188 (1973): * * *

Apparently, this Court requires an affirmative showing of prejudice, contrary to federal decisions. Again, while this Court is free to make such a requirement under state constitutional provisions, such a requirement cannot be imposed upon the exercise of the federal right. The Fifth Circuit has held that the burden of proof in similar situations shifts to the prosecution: * * *

The defendant testified that his witness was standing within a few feet of him when the incident occurred, and that he presently didn't see how he could prepare his case without the testimony of this witness. The State did nothing to contradict these claims, either by way of argument or evidence.

If this Court feels that such a showing is inadequate, then precisely what sort of showing would be sufficient? How can the defendant establish what his witness would have said?

In the Court's treatment of defendant's pre-indictment due process claim, the Court reaches the conclusion that

> "Any prejudice resulting from Fitzmorris' death is nonetheless attributable to defendant and not the State. Regardless of Cole's culpability, Fitzmorris died by his hand." *Slip op.*, p. 3.

If we apply — for the sake of argument — the old-fashioned pre-trial presumption of innocence, the Court's reasoning places Cole in a dilemma: he can either defend himself against an attack by his witness at the cost of losing the witness, or he can suffer serious injury and perhaps even death by not resisting the attack. Faced with the possibility of conviction in the absence of the witness, the choice given Cole under the Court's reasoning is between a maximum of ten years

at hard labor, and permanent injury and possibly death. This would be a formidable decision to be made by one fully aware of the alternatives, but Charles Cole did not know of the battery prosecution at the time of the shooting.

In practice, the Court's conclusion that Cole is responsible for any resulting prejudice forces Cole to forfeit his constitutional rights to a speedy and fair trial under penalty of loss of life or limb. This conclusion overlooks the three and one-half year delay between the alleged battery and the death of the witness. Had Cole been tried within a few months (as is the norm) of the date of the alleged crime, the witness would have been available. The *delay* caused the loss of the witness, the very delay this Court finds unjustified.

IV. THE BALANCING TEST

The four factors in Barker v. Wingo are not a checklist, all of which have to met to make out the denial of a speedy trial.

* * *

PRE-INDICTMENT DELAY

Charles Cole was not prejudiced by any occurrences during the pre-indictment delay of two and one-half years. The asserted prejudice (the death of his witness) occurred after indictment.

However, Cole contends that the *combination* of pre-indictment and post-indictment delays placed the trial date beyond the life of his witness: had either delay been shortened by one year, the witness would not have been unavailable for trial.

* * *

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 23rd Day of June, 1980, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

* * *

66,793 State v. Charles Cole

* * *